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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLEE

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Dated December 26, 1947.

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INTRODUCTION

This case involves an attack on an order of the Interstate Commerce Commission authorizing a merger of Pere Marquette Railway Company into The Chesapeake and Ohio Railway Company. A map of the two roads appears at R. 132A.

The attack is made by appellants as holders of Pere Marquette Preferred Stock who had opposed the application before the Commission. The District Court of three Judges below denied a stay on June 4, 1947, and later dismissed the complaint. The merger was consummated on June 6, 1947. Appellants later took this appeal. They disclaimed below any attack on the merger as such or on its conformity with the public interest, seeking only an improvement in the terms of their treatment.

Pere Marquette and C&O intervened as of right below, together with Alleghany Corporation, holding over 6% of the Common Stock of C&O. The latter, as the surviving corporation in the merger, and Alleghany are here as appellees to submit that the appeal is without merit.

OPINIONS BELOW

The opinion of the District Court of three Judges (R. 254) is reported in 72 F. Supp. 560.

The Report of the Commission (R. 5) is reported in 267 I. C. C. 207.

JURISDICTION

The judgment of the court below was entered on June 16, 1947 (R. 257). The petition for appeal was filed on July 22, 1947 (R. 257). Probable jurisdiction was noted on October 13, 1947 (R. 267).

The jurisdiction of this Court rests on Section 210 of the Judicial Code as amended by the Urgent Deficiencies Appropriation Act of 1913 (28 U. S. C., §47a) and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C., §345).

QUESTIONS PRESENTED

The only issue presented to the court below was whether the Commission's order should be set aside on an allegation that "Failure to include protection for plaintiffs *as dissenting stockholders,* AS A DISTINCT CLASS CREATED BY THE MERGER, is contrary to law. . ." (Complaint, R. 3, emphasis supplied) The court below answered that question in the negative, holding, in effect, that all holders of the same issue of stock are in the same class, whether assenting, non-assenting or dissenting, and the Commission has no duty to award better treatment because of dissent.

The issue is transformed by appellants here (Brief p. 13) into an assertion that the Commission's order was beyond its power, not for alleged failure to "include protection" for dissenters as a new class "*created* by the merger", as below, but for asserted failure to "include protection" for Preferred stockholders as an old class all of whose rights were vested *before* the merger, though appellants claim (Brief p. 20) that dissenters are the only members of the class still entitled to complain, their theory being that votes for the merger worked a waiver of right by others. Thus they spoke below of rights resulting from dissent, while here they speak of rights resulting from stock ownership irrespective of dissent.

Appellants' case on this new approach is based wholly on a crucial misconception of what the Commission did. Their assertion is that the Commission held itself without power

to evaluate the stipulated priorities of the Pere Marquette Preferred in all the facts for the purpose of determining just and reasonable treatment (Brief pp. 2, 6, 13, 20). From this premise a number of derivative questions and anomalies are then drawn. But, as plainly shown by the Commission's Report, it recognized its dominant statutory responsibility to assure just and reasonable treatment for all security holders and addressed itself to the patient and thorough discharge of that duty. The only question it disclaimed power to decide was whether dissenters might, or might not, be entitled to procure better than just and reasonable treatment by litigation in State tribunals, and on that question it did nothing.

So the only issues, even on appellants' new approach, are, as we see them, two:

1. Was it within the power of the Commission, in approving a railway merger under a statute vesting it with "exclusive and plenary" authority, to fix just and reasonable treatment for all Preferred stockholders (treated as a single class, however voting) through an administrative evaluation of all their stipulated priorities in the light of all the pertinent facts, or was it required as a matter of law to treat the merger like a liquidation and thus give controlling effect to the stipulated liquidation preference so as to award cash or its immediate equivalent in the full amount of par plus accumulated dividends?

We seek to answer this question by the proposition (I below) that the Commission did its full duty to assure just and reasonable treatment.

2. Is a Commission determination of just and reasonable treatment, otherwise within its power, invalidated by a mere expectation that alternative recoveries might possibly be

obtainable under some surviving State procedure, where this expectation was not embodied in any action of the Commission, whether enabling or restrictive in character, and in no way influenced its determination?

We seek to answer this question by the proposition (II below) that possible recoveries by alternative procedure under State law have no place in any issue here.

The appeal is to be considered in the light of the circumstance that appellants have not brought here the record underlying Commission action and thus may not be heard to urge that it was insufficient to support the Commission's findings.[1] We deny any concession, asserted in Appellants' Brief (p. 10), that the issues are other than as stated above, and submit that the references cited for that assertion disprove it.

STATUTE INVOLVED

Sections 5 and 20a of the Interstate Commerce Act, as amended, giving the Commission authority over mergers and the issuance of securities, respectively, are, so far as pertinent here, set out in Appendix A.

Enabling legislation of the States, though we think it sufficiently summarized in 4 next below, is appended in full text if further reference be desired (Michigan in Appendix B, Virginia in Appendix C).

STATEMENT

1.

The Two Roads

C&O is a major road between Chesapeake Bay on the east and Toledo and Chicago on the west. Its principal busi-

[1] *Louisiana & P. B. R.* v. *U. S.*, 257 U. S. 114, 116 (1921); *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 286 (1934).

ness is carrying coal. It is, indeed, the largest bituminous coal originating road in the country (R. 11). Pere Marquette was a natural complement, both by location, in that it provided a northerly extension of line from Toledo, Ohio, and La Crosse, Indiana, through the peninsula of Michigan, and also by traffic, for its principal business was to serve coal consuming industries (R. 13).

As early as 1929 the Commission found that the association of the two roads was in the public interest and authorized the acquisition of control by C&O (R. 11). Actual experience under coordinated operation after that time gave the Commission a broader basis of judgment (R. 14) on which to confirm its approval in the public interest (R. 37). Since no attack is made on its order in that respect (R. 197, 249, 254), we need not enter on the additional advantages expected from complete unification, though they may be indicated, in a word, as primarily the creation of a strong, uniform and efficient carrier throughout the whole territory, with incidental benefits by further reduction of operating expenses and improvement of the credit base for Pere Marquette bonds (R. 9-15, 36-39, 61).

2.

The Capitalization of the Two Roads

The funded debt of C&O, some 205 million dollars of bonds and equipment obligations (R. 18, 160A), is unaffected by the merger and needs no further mention. The only other securities of C&O at the time of the merger were something less than 8 million shares of Common Stock (R. 160A), with a par value of $25 per share (R. 18) but selling, at that time and now, within a range of some 10 points on either side of twice that amount (R. 42, 171). This stock is likewise unchanged by the merger. Dividends have been

paid in every year of this century except 1915 (R. 45). Continuation of the present dividend rate of $3.50 per share is a reasonable expectation (R. 49).

Funded debt of Pere Marquette consisted of 56 million dollars of publicly held First Mortgage Bonds and equipment obligations (R. 35, 160B). Under the merger it was assumed in its entirety by C&O and was, accordingly, unaffected. The only securities changed by the merger were the shares of Pere Marquette stock. There were 3 classes:

(*a*) Prior Preference Stock (111,999 shares outstanding) of the par value of $100 per share and entitled to one vote per share on all matters (R. 18). The dividend rate is 5% and dividends are fully cumulative (R. 18). Dividends are in arrears since November 1, 1938 (a total of $36.25 a share as of February 1, 1946, R. 49). The redemption price, and the stated liquidation preference, are par plus accumulated dividends (R. 50).

(*b*) Preferred Stock (124,288 shares outstanding) of the par value of $100 per share and entitled to one vote per share on all matters (R. 18). The dividend rate is 5% and dividends are fully cumulative (R. 18). Dividends are in arrears since August 1, 1931 (a total of $72.50 a share as of February 1, 1946, R. 49[*]). The redemption price, and the stated liquidation preference, are par plus accumulated dividends (R. 50).

(*c*) Common Stock (450,448 shares outstanding), also of the par value of $100 per share and entitled to one vote per share (R. 18).

The Pere Marquette charter, though not in the record before this Court, is on file with the Commission. (Finance

[*] $75, being the accrual to August 1, 1946, is occasionally used in the Report, *e. g.*, R. 51. Only $30 had been earned (R. 51).

Docket 11228). Since appellants stress an argument of charter right, we supply, for convenience, the text of Article IV (being the whole of the stock description) as Appendix D. We refer for brevity, to rights created by the charter as stipulated priorities", though of course, there is no stipulation except the charter.

The C&O owned at the time of the merger 13,950 shares of Pere Marquette Preferred and 313,900 shares of Pere Marquette Common (R. 163). This was 11% and 70% of the respective issues (R. 9). Many principal officers held the same position in both companies (R. 14). For this reason the Commission held that the terms and conditions of the Merger Agreement "compel close scrutiny" (R. 54), and in its decision, as pointed out more fully below, "we [of the Commission] have undertaken to do this" (R. 54). To anticipate, we may add that a majority approval of each class of Pere Marquette stock was also a condition to the merger becoming effective (3-5 below).

3.

The Merger Agreement

When the earnings and interest rates of war time (R. 40) permitted a large reduction in Pere Marquette fixed charges by a refunding in 1945, consideration of a possible merger was undertaken (R. 15). A meeting of minds between the two boards of directors occurred on essential terms on December 4, 1945 (R. 16). These were embodied in the formal terms of the Merger Agreement (R. 101) and it was approved by both boards of directors on February 19, 1946 (R. 16). It provides the following treatment for Pere Marquette stock of the 3 classes (including accumulated divi-

dends and applying also to shares held in the treasury of C&O):

Each share of Pere Marquette	*is converted into the following shares of C&O*	
	New Preferred	*Common*
Prior Preference Stock	1	1/3
Preferred Stock	8/10	4/10
Common Stock		1/2

The new C&O preferred stock created by the Merger Agreement is the initial series of a new class of Preferred Stock, designated 3½% Convertible Preferred Stock (the New Preferred). It bears fully cumulative preferential dividends at that rate, has a par value of $100 a share and is entitled to one vote on all matters (R. 106, 108, 112 and 114). Each share of the New Preferred is convertible at any time, at the option of the holder, into 1.6 shares of Common Stock, with protective provisions to assure the same proportionate conversion ratio despite intervening changes of capitalization (R. 114). The New Preferred is redeemable (but not earlier than November 1, 1950) at $105 per share (R. 120) together with a sum equal to all dividends accrued or in arrears (R. 110). The stated dissolution preference is the same (R. 109, 114).[3] In addition, the New Preferred, together with any future series of that class, is entitled to the benefits of a Retirement Fund (R. 112), under which 5% of residuary earnings in each year, as defined (but not more than enough to produce a balance of 1 million dollars in the fund), are to be set aside for the purchase of such stock.

The allocations were made, not as of a fixed calendar date,

[3]The $100 figure at Appellants' Brief, p. 7, n. 1 is erroneous.

but as of the Merger Date (R. 125-26). It was defined to be, and the merger was declared to become effective on, the date (after stipulated corporate authorization, action by the Commission and filing with the proper Michigan authority) when the Merger Agreement should, by order of the State Corporation Commission of Virginia, be admitted to record in its office (R. 130-31). The stipulated corporate authorization was 98% assent by each of the 4 classes of stock, or any smaller percentage adequate under State law "if the board of directors of each of the parties hereto shall determine that it is practicable and desirable and in the interests of such party to consummate the merger with the votes and assents then obtained . . ." (R. 130). The amount of assents (above State law requirements) was significant as limiting potential liabilities to dissenters (R. 98).

Dissenters, as well as all other stockholders (whether assenting to the plan or taking no action at all), were to be entitled to the allocations stated above (R. 126). It was also provided in the Merger Agreement that any stockholder not voting for the merger and desiring to dissent might (and, if so provided at the time by Virginia law, should) serve notice of dissent on specified corporate officers "at any time within three months after the date of the meeting of the stockholders of his corporation. . ." (R. 131). The Proxy Statement (R. 79) included the full text of the Merger Agreement (R. 101) and the full text of Sections 3822-a and 3822-b of the Virginia Code with respect to dissenters' rights (R. 175). The latter section, by then enacted, required the notice of dissent prescribed in the Merger Agreement. The Proxy Statement further pointed out that "The statutes of Michigan contain no provision dealing with this subject." (R. 99)

4.

State Laws

Statutes, both of Virginia, where C&O was incorporated (R. 11), and Michigan, where Pere Marquette was incorporated (R. 12), authorize the merger. Both these statutes may be sufficiently put by summary, for nothing turns here on their details.[4]

Virginia law provides, and has for many years (Code of 1919, as amended, Section 3821, Appendix C) that:

> ". . . any corporation . . . organized . . . under any law or laws of this State . . . may merge or consolidate in the manner prescribed in Section 3822 of the Code as amended into a single corporation with any other corporation organized for the purpose of carrying on the same or a similar business or for the same or similar purposes under the laws of this or any other state . . ."

Section 3822 prescribes the requisite corporate procedure as being (*i*) entry by the boards of directors of the two companies into a merger agreement providing for designated subjects, (*ii*) adoption of the agreement at stockholders' meetings of each company by "a majority of all the votes cast at each of such meetings" and (*iii*) the entry of an order by the Virginia Commission granting a certificate of merger and directing its recordation. Sections 3222-a and 3222-b (R. 175) provide procedure for any stockholder who has not assented to the merger and who wishes to dissent. In brief, the procedure is (*i*) service of notice of dissent in the manner and time designated in the Merger Agreement here involved and (*ii*) appraisal of "the fair cash value" of his stock as of the day before the stockholders' meeting, to

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[4]Their full text is supplied, however, in Appendices B and C.

be made by a Virginia court, in proceedings initiated by the dissenter or by the company. It has not been judicially determined whether these provisions apply to stockholders of a foreign corporation merged into a Virginia corporation. That question is pending for determination by the Chancery Court of the City of Richmond in appraisal proceedings instituted by the C&O on June 6, 1947,[5] but suspended pending decision of this appeal.

Michigan statutes have also, for many years (since 1855), authorized consolidations of railroads, including consolidations of domestic corporations with foreign corporations. They have never made any provision for appraisal of dissenting shares. Specifically, consolidations were authorized, without provision for dissenters, by the Michigan Railroad, Bridge and Tunnel Companies Act of 1873, well before the incorporation of Pere Marquette in 1917. The prescribed procedure is (*i*) entry by the boards of directors into a merger agreement providing for designated subjects, (*ii*) sanction of the agreement "by a majority vote of the stockholders of each class of stock having voting powers" and (*iii*) filing of the agreement with a designated Michigan authority. The only significant amendment, that of 1946, was to enlarge the technical form by permitting mergers as well as consolidations where foreign corporations are involved.[6]

Except in case of business corporations after 1931 (when an amendment to the 1921 General Corporation Act conferred the appraisal privilege in respect of corporations governed by that Act) no court in Michigan, whether State or

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[5] *The Chesapeake and Ohio Railway Company* v. *Hylas N. Hastings, et al.* A petition by appellants here for removal to the District Court of the United States for the Eastern District of Virginia was denied, as not presenting a separable controversy, by the Chancery Court on July 24, 1947, and by the District Court on October 6, 1947.

[6] The full text as amended appears in Appendix B.

Federal, has, we believe, permitted an appraisal or other cash recovery in case of any merger or consolidation accomplished through procedure authorized by statute. On the contrary, we believe the Michigan doctrine to be (except only for business corporations after 1931) that the possibilities of merger and consolidation are a term of the contract to which the purchaser of stock agrees and he has, accordingly, no right to be bought out in such event through any form of appraisal or other procedure.[7] This is the more readily understandable in view of the fact that the traditional pattern of railway growth, so strongly supported by the public interest, is by unifications, and in view of the further circumstance that the Michigan act now permits unifications only after administrative authorization by the Interstate Commerce Commission.

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[7] *Kirby* v. *Saginaw Hotels Co.*, 253 Mich. 308, 235 N. W. 153 (1931), citing *Mayfield* v. *Alton Railway Gas and Electric Co.*, 198 Ill. 528, 65 N. E. 100 (1902); *Wells* v. *Rodgers*, 60 Mich. 525, 27 N. W. 671 (1886); *Detroit, Lansing and Lake Michigan R.* v. *Starnes*, 38 Mich. 698 (1878); *Monroe* v. *Fort Wayne, Jackson and Saginaw R.*, 28 Mich. 271 (1873); *Swartwout* v. *Michigan Airline R.*, 24 Mich. 389 (1872). The last 4 of these cases permit a consolidated corporation to recover unpaid subscriptions to stock of the constituent companies, and thus mean that a stockholder in a constituent corporation is not entitled to be bought out after a consolidation. Far from supporting appellants' case, *Voigt* v. *Remick*, 260 Mich. 198, 244 N. W. 446, 449 (1932), *cert. den.*, 289 U. S. 756 (1933, Appellants' Brief, p. 14, n. 5) actually holds that purchasers of stock agree to the disposition of their investment by "all powers conferred upon the corporation by law", citing the power to consolidate. *Sutton* v. *Globe Knitting Works*, 276 Mich. 200, 267 N. W. 815 (1936, Brief, p. 9, n. 3) deals only with an attempted elimination, by charter amendment, of an unconditional promise to redeem on a day certain.

5.

Stockholder Action

At stockholder meetings in April and May, 1946, the merger was accepted by more than the statutory vote of each company (R. 17). The details follow:

Class of stock	*Accepted by the following percentages of*	
	Shares Outstanding	*Shares Voted*
Pere Marquette Prior Preference	71.33	93.11
Pere Marquette Preferred	58.91	70.91
Pere Marquette Common	82.37	93.06
C&O Common	59.27	98.87

All unassented shares were potential dissenters. But, of course, many of these holders were merely silent. In fact, relatively few dissents were filed within the 3 months' period provided by the Merger Agreement and the Virginia statute. Since that time most of the Pere Marquette stock has been surrendered in conversion, so that the shares still outstanding, whether assenting, non-assenting or dissenting, are about the same as the number seasonably dissented.* The details follow:

Class	*% seasonably dissented*	*Still outstanding*	
		%	*No. of shares*
Pere Marquette Prior Preference	1	1.75	1,958
Pere Marquette Preferred	10.15	8.40	10,419
Pere Marquette Common	4.46	4.60	20,765
C&O Common	*		

*100 shares only.

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*The dissents are shown at R. 56, n. 14. The shares surrendered in conversion are not of record here but, being shown in an official report of C&O on record with the Commission, may be judicially noticed (*Insurance Group Committee* v. *Denver & Rio Grande Western R.*, 329 U. S. 607, 616-18, 1947). The whole report is reproduced, for convenience, as Appendix E.

6.

The Commission's Action

(*a*) *Procedure*

Application was filed with the Commission on March 8, 1946, for requisite authorization under the Interstate Commerce Act, chiefly Sections 5 and 20a (R. 7-8). Certain Pere Marquette stockholders intervened (R. 9). A hearing was held (R. 9). A proposed report was then issued (R. 7 and 9). Appellants then intervened (R. 9). After oral argument (R. 56), decision was rendered by Division 4 on April 1, 1947 (R. 5), about one year after the application was filed. On petition by appellants for rehearing, the effective date of the order was at first stayed (R. 67) and then, rehearing being denied by the full Commission, fixed at 15 days after May 20 (R. 68). Appellants then asked the Commission for a further stay (R. 69) and it was denied.

(*b*) *The Evidence Considered*

The sufficiency of the evidence to support the Commission's findings is not an issue here (p. 4 above). But for the purpose of showing the scope and nature of the Commission's consideration, we mention the main lines of evidence that it considered, looking for this purpose only to the findings of fact in the Report. The implications from some of these findings appear in the Argument below.

The Commission began with an analysis of the intercorporate relationships among the three applicants (R. 9-10). Taking up then the C&O system, the Commission traced its corporate history, its mileage, the territory served and the business carried (R. 11). Similar information was reviewed for the Pere Marquette system (R. 12-13). The Commission then looked at the history of the affiliation between the C&O and Pere Marquette, including the benefits derived

from coördinated management since 1929 (R. 13-15). It then turned to the negotiation of the Merger Agreement, the applicable provisions of local law and the figures on stockholder vote (R. 15-17). The present financial structures of both roads were then examined (R. 17-18) and the Merger Agreement described at length (R. 18-36).

Turning to the effect of the merger, the Commission examined a *pro forma* balance sheet reflecting the consummation of the merger (R. 36) and probed the consequences for various significant factors of the public interest (R. 36-39). It then took up the fairness of the terms. Though considering market prices of securities, as evidential of prospective earnings and investment value (R. 41-43), the Commission felt it should not confine its examination so narrowly. It analyzed the business history of both roads, their reported earnings in various informative periods, the relative amounts and trends of these earnings and the results of combining them in a single income account (R. 43-46). Historical earnings were then applied to the new capitalization, and the outlook for earnings and dividends after the merger was surveyed (R. 48-50). The Commission then recited the redemption terms and the stated liquidation preference of the Prior Preference Stock and the Preferred Stock and concluded with a summary of the dividend record in the past and a finding that their prospects for a return in the future would be improved by the merger (R. 50-52). Though prospective earnings were evidently taken as the primary criterion, the Commission looked also at book value and at rate-making value plus net additions (R. 46-47). In conclusion, the Commission found the proposed treatment "just and reasonable" (R. 52), satisfied itself that the maximum possible cash payment to dissenters would not impair the ability of the road to perform its public functions (R. 55-56), and reviewed miscellaneous matters not significant here (R. 56-61).

(c) *The Commission's Reasoning*

The Commission clearly recognized two primary responsibilities, first to see that the public interest would be served by unification on the terms proposed, and second to see that the terms were just and reasonable to security holders.

Thus on the latter point it declared that:

> ". . . we are expressly enjoined by the statute to make specific findings with respect to the terms and conditions of transactions proposed under section 5(2) . . ." (R. 40)

It faced this issue on its own merits, uninfluenced by overwhelming stockholder approval and limited opposition, for this, the Commission said, "does not affect the issue" (R. 40) and it must discharge its full statutory task "if not a single share be in dissent" (R. 40).

Refusing the aid of short cuts in the field of reasonableness, the Commission went to the root of the problem in its traditional way, saying

> "In the discharge of our duty under the statute to find whether the terms and conditions proposed for the merger are just and reasonable, we cannot confine our inquiry to market opinion, but must give consideration to all relevant elements of value." (R. 43)

It made, accordingly, a comprehensive review of all the factors mentioned in (*b*) next above, and on this broad base came to its ultimate conclusion that:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both

parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable." (R. 52)

By this examination and finding, the Commission's duty on the question of reasonableness was discharged. It then turned to a consideration of alternative remedies urged to be available under State law, particularly the asserted rights to appraisal in statutory proceedings or cash payment in equity proceedings. This is the point where appellants slip into their crucial misconception of Commission action. The pertinent discussion, placed after the whole review of fairness and the ultimate conclusion on it, is entitled "Jurisdiction" (R. 52). It deals with the opposing arguments of the several parties on asserted alternative remedies under State law. On the one hand, appellants contended that by contract under Michigan law the holders of Pere Marquette Preferred were entitled to better treatment and the Commission should give it to them or, at least, not foreclose resort by them to State tribunals. On the other hand, the C&O, desiring, as the Commission found, to "deal fairly" (R. 54) and mindful of the doubts and limitations in appraisal rights under relevant local laws (p. 10 above), voluntarily proposed that the Commission require it to pay any dissenting stockholder who might be so disposed in such amount as might be found by the Chancery Court of the City of Richmond, Virginia, following, consensually, the procedure of the appraisal statute.

The Commission, however, held firmly to the Federal Act as measuring its duty in the premises. That was, it said, to satisfy itself that the proposed treatment is just and reasonable and that all stockholders in the same class are to receive it (R. 54). But this, it thought, was the extent of its duty, and it should not attempt any action to enlarge or restrict

any remedies possibly available under State law, for the question whether dissenting stockholders "are entitled to better treatment" than the just and reasonable terms contemplated by the Act is a matter for the courts, and thus "not within our province to decide" (R. 54).[9] What the Commission so disclaimed, we believe, was jurisdiction to decide what alternative remedies, if any, might prove available under State law and what might be recovered through them if available. The words can not, we believe, be read (Appellants' Brief, p. 20) as disclaiming jurisdiction to determine the just and reasonable equivalent for the stated priorities of Pere Marquette Preferred as evaluated on all the pertinent facts, for that was a task the Commission had just done in full. So, after satisfying itself that the maximum cash burden that might conceivably be imposed on the C&O in any such State litigation would "not involve a burden of excessive expenditure" (R. 50), the Commission granted full authorization for the merger.

7.

Action of the Court Below

On denial of a stay by the Commission, appellants filed their Complaint (R. 1) in a District Court of three Judges, pursuant to the Urgent Deficiencies Appropriation Act of 1913 (R. 1). Apart from introductory and argumentative recitals, it makes only one operative allegation:

> "Failure to include protection for plaintiffs *as dissenting shareholders, as a distinct class created by the*

[9] It is the ordinary rule that an administrative agency enforces the act laid down for it by the Congress, leaving any questions of constitutionality to the courts. *Panitz* v. *District of Columbia*, 112 F. 2d 39, 42 (App. D. C., 1940); *Todd* v. *S. E. C.*, 137 F. 2d 475, 478 (C. C. A. 6, 1943); *Engineers Public Service Co.* v. *S. E. C.*, 138 F. 2d 936, 951-53 (App. D. C., 1943), app. dism., 332 U. S. No. 2, I (Oct. 20, 1947).

merger, is contrary to law and a direct violation of the Commission's statutory duty to impose just and reasonable conditions for the protection of all interests concerned" (R. 3, italics added).[10]

C&O, Pere Marquette and Alleghany intervened (R. 181-83) and filed a motion to dismiss (R. 182), in which the United States and the Commission later joined (R. 253). Other stockholders, holding large amounts of Pere Marquette stock of all classes, intervened in vigorous support of the Commission's action (R. 183-92).

After full argument (R. 193-251), the court denied a stay, and received the case for disposition on the merits, upon inclusion, by stipulation (R. 252), of the Proxy Statement (R. 79) as additional evidence.

By later opinion (R. 254) the court granted the motion to dismiss. Broadly summarized, this was on the basis that (*i*) the Commission's ultimate finding (p. 16 above) "is within the powers of the Commission, . . . is based on substantial evidence, and is in accord with accepted legal standards," and was therefore final,[11] (*ii*) there was no basis for the theory of the Complaint that

> "dissenting stockholders (quite apart from any merit in the grounds of dissent) are entitled to preferential treatment, more favorable than the treatment accorded

[10] This was the only issue tendered by the Complaint. It was not broadened (Appellants' Brief, pp. 2, 10) by attaching a copy of the Commission's Report reciting various contentions in the administrative proceedings.

[11] Appellants criticize this reference to evidence (Brief, p. 10), for the Commission record was not supplied. But obviously the opinion, like the motion to dismiss (R. 182), meant the evidence as embodied in the findings of fact made by the Commission in its Report. Their range is indicated in 6 (*b*) above.

> to stockholders of the same class (holding the same securities) who did not dissent . . ." (R. 255)

and (*iii*) neither the Commission nor the Court undertook to pass on possible remedies in State tribunals, "whatever they may be", but they could be considered by the proper tribunal when presented to it.

It is from this order of dismissal that the appeal is taken.

8.

Consummation of the Merger

Pere Marquette and C&O were, of course, under fiduciary obligation to their stockholders, a large majority of whom desired the merger. If consummation were to be delayed beyond June 6, 1947, the Pere Marquette stockholders would probably lose the dividend payable to holders of C&O Common of record on that day, for Virginia law makes a merger operative at the time of entry of the Virginia Commission's order (R. 234) and that was the date as of which the Merger Agreement spoke, without provision for retroactive operation (p. 8 above). As might be imagined, any prospect of such a loss was most unwelcome to the majority holders of Pere Marquette Preferred (*e. g.*, R. 243-46).

So when the District Court denied a stay on June 4, 1947, and no appeal was taken or stay pending appeal requested, Pere Marquette and C&O, in accordance with announced plan (R. 234), consummated the merger by filing in Michigan and Virginia on June 6, 1947, and an order of the Virginia Commission was entered that day.

By far the greater part of each issue of Pere Marquette stock has now been surrendered in conversion (p. 13 above). Both issues of C&O stock are listed and traded on the New York Stock Exchange.

SUMMARY OF ARGUMENT

I.

The Commission Did Its Full Duty to Assure Just and Reasonable Treatment

By imposing on the Commission responsibility to see that the terms and conditions of railway mergers are "just and reasonable" and by making the Commission's authority "exclusive and plenary", Section 5 of the Interstate Commerce Act incorporates the same standard of equity practice that is embodied in the Bankruptcy Act and the Public Utility Holding Company Act. (See I, 1 below)

This standard of fairness takes into account all differences of fact. Foremost among these for a preferred stockholder in a solvent corporation is that, unlike a creditor, he has no right to compel immediate payment. (*Id.*)

All elements in his bundle of rights are, therefore, to be weighed by the administrative judgment in the light of all the circumstances, in comparison with the new securities, "to determine whether the new are the equitable equivalent of the old". (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U. S. 523, 566, 1943).

The Commission here did not disclaim jurisdiction to require the "just and reasonable" equivalent of the old securities, but on the contrary weighed all the stipulated priorities of the Pere Marquette Preferred, including its accumulated dividends and preferential rights in the event of liquidation, in comparison with the terms and characteristics of the new securities, in the light of all the pertinent facts, including the history of the past and the prospects for the future, with respect to business, earnings, assets and other elements of value. This was a full discharge of its

administrative duty in accord with legal standards and its judgment is therefore final. (See I, 2 below)

No rule of law requires the Commission to abdicate the exercise of its administrative judgment in a railway merger and automatically award to the holders of Pere Marquette Preferred, without regard to the facts, cash or its immediate equivalent in the full amount of par plus accumulated dividends as their stipulated liquidation preference, because the meaning of "just and reasonable" is a matter of Federal law, which tolerates no such limitation on the Commission's function to reach a just result in all the facts. (See I, 3 below)

If Michigan law were to the effect that a merger automatically matures a liquidation preference, this would so impede the Federal policy for unifications as to fall within the "restraints, limitations, and prohibitions" from which railroads are automatically relieved by Section 5(11) upon the entry of an authorizing order of the Commission (*Texas* v. *United States*, 292 U. S. 522, 1934).

But, more fundamentally, the standard of fairness in itself requires this result here, just as the identical standard has been held to do under the Public Utility Holding Company Act (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 1945) and the Bankruptcy Act (*Vanston Bondholders' Protective Committee* v. *Green*, 329 U. S. 156, 1946).

In the application of this Federal standard of fairness, stockholders gain no additional rights by voting against the merger (*Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R.*, 328 U. S. 495, 535, 1946) and lose none by voting for it, so the Commission properly treated all holders of Pere Marquette Preferred on the same basis and limited its action to assuring that each would be entitled to receive a "just and reasonable" award of new securities. (See I, 4 below)

II.

Possible Recoveries under State Procedure are Not In Issue Here

Since the Commission's function is solely to enforce Federal procedure by assuring stockholders of a "just and reasonable" award of new securities, it properly held that it had no province to decide whether they might obtain "better" than "just and reasonable" treatment through some surviving State procedure that might afford them alternative remedies. The Commission took no action with respect to any such potential remedies, either to enlarge or to restrict them, and they have no part in any issue here.

The order of the Commission is valid whether or not State procedures are superseded by the "exclusive and plenary" grant of power to the Commission, for if Section 5 automatically occupies the whole field, there is no need for the Commission to say so, and if it gives the Commission discretionary authority to supersede State procedures where needed for the free play of Federal policy, the Commission justifiably abstained from such foreclosure here because the potential claims are so small in relative amount as to support its finding that they "will not involve a burden of excessive expenditure".

It is clear from the Commission's Report that possibilities of recovery by dissenters through State procedure were not counted as an element in their "just and reasonable" treatment which the Commission was concerned to assure.

The Commission, therefore, did its full duty when it required a "just and reasonable" award of new securities and left for the courts the decision on any alternative remedy under State procedure if and when asserted.

ARGUMENT

I.

The Commission Did Its Full Duty to Assure Just and Reasonable Treatment

1. *The Governing Standard*

The Commission's responsibility to protect private right, as well as public interest, is clear. Both text and history concur.

Unification of interstate railroads, in a pattern consistent with economical and efficient transportation service, has long been a fundamental policy of the Congress. It was first proclaimed in the great remedial measure of 1920, after the experience in World War I, by which the Interstate Commerce Act was reoriented from a policing measure into a constructive administrative program. *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R.*, 257 U. S. 563, 585 (1922). Complete unifications, the ultimate goal, were provided for in paragraphs (4)-(6) of Section 5, though, unhappily, on conditions of conformity to a master plan and to physical value of the affected properties that served to block any utilization. Acquisitions of control, however, were also provided for, "either under a lease or by the purchase of stock, or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation", and this power was conferred in more flexible terms. They contemplated Commission approval if "in the public interest", but only "on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." (37 Stat. 566) In sum, the Commission was given full power over acquisitions of control, upon its administrative application of the dual standard of public interest and private right.

The latter element of this standard received judicial interpretation in *Cleveland, Cincinnati, Chicago & St. Louis R.* v. *Jackson*, 22 F. 2d 509 (C.C.A. 6, 1927, the *Big Four Case*). This was an application by a stockholder of the Big Four to enjoin consummation of a lease of the Big Four properties to the New York Central. Application had been filed with the Commission, and was then pending before it, for suitable authorization under Section 5(2). The District Court's grant of a preliminary injunction was reversed on the ground that the petition was premature, since the complainant would be entitled, before the lease could be consummated, to be heard in the proceedings before the Commission (and also, for that matter, in court review if desired) and in those proceedings it would be the Commission's duty to consider and protect the private rights of investors:

> "We think it is the duty of the Commission to protect both the public and private interests, and although it finds that the acquisition will be in the public interest, it may not approve the lease unless it further finds that the consideration, terms and conditions thereof are just and reasonable—just to the lessor, the lessee, and necessarily to the stockholders of each. The ruling in the Nickel Plate Case, 105 Interst. Com. Com'n R. 425, evidences such an interpretation of its duties by the Commission.
>
> "While it is true, as plaintiff contends, that the law does not require that minority stockholders be made parties to a proceeding before the Commission seeking the approval of a lease, it is also true that the Commission has heard such stockholders when requested to do so, and that the statute itself, as we construe it, requires that the interest of the stockholders be considered and protected. Furthermore, the orders of the Commission authorizing a lease are subject to review on behalf of a stockholder in a court proceeding. Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667; 38

Statutes at Large, p. 220 (28 USCA §47). It results, therefore, that before the lease can be made effective, an objecting stockholder has the right to present his case before two tribunals, both of which are charged with the duty of protecting his interest." (510-11)

With this judicial record before it, the Congress, in revising Section 5 by Emergency Railroad Transportation Act of 1933, adopted the phrase "just and reasonable" as a key concept governing all forms of unification and acquisitions of control. They were all swept into a single clause (paragraph (4), now paragraph (2), of Section 5); the value requirement was omitted; and the Commission was given full authority, subject only to conformity with its master plan (a limitation omitted in 1940), to authorize unifications and acquisitions of control of any kind upon finding that, "subject to such terms and conditions and such modifications as it shall find to be just and reasonable", the transaction would "promote [now, "be consistent with"] the public interest" (48 Stat. 217).

At that time the Congress was deeply concerned with the future of the railroads and the fairness of the treatment to be accorded their security holders. Just three months before it had enacted the first railroad bankruptcy legislation (Section 77), in which it gave the Commission authority for initial determination of all matters of private right in bankruptcy reorganizations. Both acts may well be thought a part of a Congressional effort to center in the Commission, as the single expert tribunal, the administrative determination of all these matters throughout the field. Together they cover the two situations most likely to produce modifications of stockholder position, that is, the pressure of debt, from which bankruptcy proceedings may result, and the unification of different systems, where property interests must be adjusted into a common frame.

These implications are strengthened by the further amendment of 1940 (54 Stat. 905) in which the Commission's power to authorize unifications was characterized in terms as "exclusive and plenary" and corporate power was conferred to carry out Commission orders (paragraph (11) of Section 5). The quoted words are ordinarily given the effect of preëmpting the field, at least on all subjects touched in the Federal regulation (*Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 1947). They require, therefore, a "plenary" interpretation of "just and reasonable" even if not previously necessary.

In this setting of policy and history, "just and reasonable" undoubtedly refers to the classical tradition of equity practice and is thus identical with the "fair and equitable" standard in the Bankruptcy Act and the Public Utility Holding Company Act. To be sure, the words "fair and equitable" are words of art (*Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 1939). But the particular form of that phrase is not talismanic in itself. The same standard is equally denoted by the word "just" alone (*Northern Pacific R.* v. *Boyd*, 228 U. S. 482, 508, 1913; *Case* v. *Los Angeles Lumber Products Co.*, at p. 118). Indeed, the two forms "just and reasonable" and "fair and equitable" are not infrequently blended. Thus the "fair and equitable" standard in Section 11 of the Holding Company Act was referred to as "fair and *reasonable*" by the Second Circuit[12] and in the *Big Four Case* itself the "just and reasonable" standard was referred to as "*fair* and just" (22 F. 2d at p. 511).

Since this is a pervasive standard of fairness, it applies to solvent companies as well as insolvent ones (*Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527, 1941) and not only between debt and stock but also between classes

[12] *New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274, 276 (C. C. A. 2, 1942), *cert. den.*, 318 U. S. 786 (1943), italics supplied.

of stock (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 634, 1945). But, as a standard of fairness, it takes into account all differences of fact. Most conspicuous of these, in the case of a preferred stockholder in a solvent corporation, is that, though having certain rights to preferential treatment over the common at some time, those rights are not, apart from liquidation or some exceptional circumstance of fraud, presently enforceable so as to compel immediate payment. For example, it was said in *Porges v. Vadsco Sales Corporation*, 32 A. 2d 148 (Del. Ch., 1943), in denying an injunction against a merger which would recognize common stock though net assets per books were less than the par and accumulated dividends of the preferred:

> "But the corporation is not in liquidation, and complainant has shown no semblance of a right in the preferred stockholders to require that it be liquidated. The corporation is a going concern; and it is necessary to view the rights of the two classes of stock in the light of the probability that it will continue thus for an indefinite period." (151)

The same concept has been repeatedly applied by the Securities and Exchange Commission in the administration of Section 11 of the Holding Company Act:

> "Absent liquidation, the liquidation preference of a senior class of stock is only an inchoate right to a future payment, which has no definite maturity date, and which will not mature into a present claim despite failure to pay dividends."[13]

[13] *Federal Water Service Corporation*, 8 S. E. C. 893, 910-11 (1941), reversed on other grounds, *Chenery Corporation* v. *S. E. C.*, 128 F. 2d 303 (App. D. C., 1942), affirmed, *S. E. C.* v. *Chenery Corporation*, 318 U. S. 80 (1943). A recent example, from the numerous available cases, is *The Middle West Corporation*, Holding Company Act Release No. 7905 (December 9, 1947).

It follows that stated dividend preferences and stated dissolution preferences can not be viewed, in determining fair treatment, except as elements in the whole bundle of rights to be compared, in the light of all the circumstances, with the new securities "to determine whether the new are the equitable equivalent of the old" (*Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U.S. 523, 566, 1943). Since "such a determination rests in the realm of judgment rather than mathematics" (*id.*, 567), it is distinctively a matter for the informed discretion of the Commission.

The issue, therefore, is not, as appellants argue (Brief, pp. 26-27), whether the full priority rule applies in mergers under Section 5, but whether the Commission exercised its informed discretion in accordance with that standard.

2. *The Commission Applied the Governing Standard*

The applicable standard being so identified, we now ask whether it was in fact applied by the Commission. For that we turn to the report itself, to show that the Commission did not disclaim jurisdiction to enforce the just and reasonable equivalent of the old securities, as appellants urge for the fundamental premise of their case, but on the contrary undertook to apply that standard with all the resources at its command.

As we have seen in the Statement above, the Commission refused to limit itself to any one line of evidence but gave consideration to "all relevant elements of value" (R. 43). It obviously gave most weight to prospective earnings, as indicated by the earnings in the past, developments in wartime and the business history and prospects of the territory served (R. 43-46). But physical values were also examined, as indicated by book values and final value for rate making

purposes plus subsequent net additions (R. 46-47). Market quotations were also considered (R. 41-42). All these lines of evidence gave support to the merger terms. On earnings, the Commission noted that the holders of Pere Marquette Preferred would, for their old position in a company of unstable earnings, acquire a position in a company with a long record of unusually dependable earning capacity (R. 43-46, 48-49). For their old Preferred Stock, with its checkered dividend record, they would receive new securities of good quality, yielding a reliable return of 4.20% against the nominal, but uncertain, rate of 5% on the old. After exercising the conversion privilege of the New Preferred, their return would be increased to 5.88%, substantially greater than the nominal rate of their old stock. Weighing these relationships in the light of the relevant earnings record of the two properties, it was the Commission's conclusion that:

> "On the whole, it would seem that the prospects of Pere Marquette stockholders for returns on their investments would be enhanced by merger of their company into the Chesapeake and Ohio." (R. 50)

From the point of view of property values, the price to be paid by C&O, taking its Common Stock at par, was about the same as the net fixed assets of Pere Marquette per books (R. 58), excluding substantial net current assets (R. 18, 48), but making no deduction for unrecorded depreciation (R. 48), usually a large item in reorganization cases. Market prices of C&O securities allotted each share of Pere Marquette Preferred were 115% of the market price for the latter stock itself and about 4 times the market price of the allotment to Pere Marquette Common (R. 42).

Such was the business background in which the Commission considered the stipulated preferences of the Pere Marquette Preferred. Contrary to Appellants' Brief (pp. 19-20),

the Commission gave attentive consideration to the amount of accrued unpaid dividends, looking to the relevant provisions of the charter (R. 50), the total accrual as related to book values (R. 51) and the portion of the book accrual ($75) that had been actually earned ($30, R. 51). But the Commission properly treated the dividends in arrears as only elements in the whole bundle of rights rather than immediately enforceable claims, pointing out that:

> "Declaration of dividends is within the discretion of directors so long as the policy in this regard does not oppress the stockholders." (R. 51-52)[34]

The Commission was also at pains to note and summarize the stated liquidation preference, though obviously taking it also as an element in the bundle not intrinsically controlling, but to be evaluated in the light of all the facts.

We summarize now the specific elements of compensation to the holder of Pere Marquette Preferred for surrender of his old rights which were noted by the Commission in its Report and are mentioned in narrative sequence above. Foremost among these is the acquisition of position in a company of unusually dependable earning capacity, instead of an unstable one (R. 43-46, 48-50). In this more secure

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[34] In view of the suggestion in Appellants' Brief (p. 28) that dividends were withheld for partisan purposes of the C&O, we may note the Commission's comment that the use of funds for the benefit of the property rather than for dividends to Common stockholders

> "should make for their long-term best interests in protecting their equities against creditors and in preserving their company's property against deterioration." (R. 52)

The Preferred stockholders would, of course, receive these benefits first. The Commission further found, in general, that the C&O's policy with respect to Pere Marquette had been beyond criticism (R. 45) and ". . . both carriers have profited" (R. 14). The great rise in market prices of Pere Marquette stocks during this period, particularly the Preferred (R. 171), corroborates the wisdom of these policies.

setting his choice is an enviable one, for he can have priority of claim (as a first, rather than a second, preferred stock) for more than half his income by reducing the rate from an old 5% to a new 4.20%, or, by foregoing priority and exercising his privilege to convert, he can increase his new rate to 5.88%. That is computed on the present Common dividend rate, the continuation of which is a reasonable expectation (R. 49). In addition, he acquires a participation in all future earnings above that level. In a word, his "prospects . . . for returns . . . are enhanced . . ." (R. 50). There is further compensation in the Retirement Fund provided for the New Preferred (R. 22-23). The redemption price and the stated liquidation preference of the New Preferred are par and accumulated dividends plus a premium of 5 points, in contrast to the Pere Marquette Preferred, which was not entitled to any premium (R. 23, 27, 50). His voting power is immediately increased from 1.00 vote per old share to 1.20 votes per old share and, if he converts, it is further increased to 1.68 votes per old share. His allotment of new securities is nearly 4 times the allotment per share of Pere Marquette Common in terms of market value when the Commission acted and over 7 times in terms of par value. These are customary and significant methods of compensation (*Consolidated Rock Products Case, supra,* at p. 528), which it is the task of the Commission to weigh (*Milwaukee Case, supra,* at p. 571).

It was only after all this review that the Commission reached its ultimate finding, already quoted in the Statement, that:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both

parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable." (R. 52)

Appellants' contention (Brief, pp. 27-28) that C&O was predisposed to favor the Pere Marquette Common because it owned 70% of the issue, is irrelevant because the Commission made its finding of fairness on the basis of its own independent consideration. Moreover, it is untrue, for in the merger C&O acquired all assets of Pere Marquette, so it made no substantive difference to C&O whether its holdings of Pere Marquette Common were recognized or cancelled. The only effect of recognizing them was to put some of C&O's own stock in its treasury, thus facilitating the mechanics of future stock financing on its part (R. 64-65), which, if consummated, will be of benefit to all security holders. Disregarding this treasury stock, the publicly held Pere Marquette Common received only 7.5% of the total price paid for Pere Marquette's equity in its assets, including treasury stock, the percentage shrinks to 5.8%.[15]

Previous decisions of the Commission on new acquisitions of control by purchase of majority stock, urged by appellants (Brief, pp. 23-24), show only a Commission policy to provide equality of opportunity by opening up a purchase offer to include minority shares. But equality of opportunity is automatically assured by the Merger Agreement here involved, since it provided identical treatment for all. The Commission has uniformly accepted "just and reasonable" treatment thus provided in identical terms for all as a satisfaction of the statutory standard in every merger or

[15]Were the funded debt of Pere Marquette (assumed in the merger) included as part of the purchase price for this calculation, the percentage would, of course, sharply decline. C&O stocks issuable in the merger are included in this calculation at par.

consolidation since 1920, without imposing any condition for special treatment of dissenters or non-assentors.[16]

The question of fair treatment for Pere Marquette Preferred is not before this Court for determination. That was a matter confided to the discretion of the Commission as the expert administrative agency, and its judgment is final if in accord with legal standards. The Commission, we submit, manifestly made a full discharge of its administrative duty in accord with legal standards. It may, indeed, be observed that the Commission, enlightened by successive decisions of this Court and by its own extensive experience under Section 77, has shown a more sensitive regard for treatment of security holders here than in any previous unification case, and has covered in its Report the full field of examination customary in the reorganization cases.[17]

3. *No Rule of Law Gives Controlling Effect to Dividend Accumulations or Stated Liquidation Preference*

Appellants urge that, quite apart from the evidence, the Pere Marquette Preferred has rights under the charter and Michigan law which, as a matter of law, made it the duty of the Commission to give more favorable treatment. While ostensibly they now give most emphasis to dividend accumulations (Brief, pp. 2, 6), in the hope of stepping around a decision of this Court to be mentioned below, it is obvious

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[16] *Toledo & Ohio Central R. Merger*, 228 I. C. C. 433 (1938); *Cleveland, C., C., & St. L. R. Merger*, 228 I. C. C. 240 (1938); *Gulf, Mobile & Ohio R. Merger*, 236 I. C. C. 61 (1939); *Delaware & Hudson R. Merger*, 257 I. C. C. 453 (1944). There were no mergers before 1933 for the reasons stated in the text (p. 24). Acquisitions of assets were permitted as extensions of line under § 1(18). *Acquisition by P. and W. Va. R.*, 150 I. C. C. 81 (1928).

[17] No problem of inadequate Commission findings can, therefore, arise (cf. Appellants' Brief p. 9, n. 1). Nor is there any basis for appellants' claim (Brief, p. 8) of an admission that priorities were not considered.

that no event has occurred to make them immediately enforceable, for "There is no covenant to pay accumulated dividends on such stock in cash before a merger may take place" (*Hubbard* v. *Jones & Laughlin Steel Corporation*, 42 F. S. 432, 437, W. D. Penn., 1941). There could be no right to present payment of accumulations unless the merger were treated as an event that precipitates the stated dissolution preference of par plus accumulated dividends.[18] That is, at bottom, what appellants urge.[19] So we deal with both arguments under the inclusive concept of the stated liquidation preference.[20]

Our point here is that the Commission was free "to determine whether the new are the equitable equivalent of the old" (*Milwaukee Case, supra*, p. 566) by balancing the equities in all the facts without being controlled by the stated liquidation preference, because the meaning of "just and reasonable" is a matter of Federal law and in the application of that standard a merger does not mature a stated liquidation preference. Additionally, we believe that Michi-

[18]In Michigan also it is clear, as in other jurisdictions, that dividends on preferred stock are not debts but payable only out of earnings when declared. *Knight* v. *Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24 (1916); *Ellsworth* v. *Lyons*, 181 F. 55 (C. C. A. 6, 1910); *Lockhart* v. *Van Alstyne*, 31 Mich. 76 (1875).

[19]Brief, p. 7, p. 8, n. 2, p. 9, n. 3 and p. 20. It was also the claim on which they came into this Court (Jurisdictional Statement, p. 7).

[20]It is beyond argument, we believe, that preferred arrearages may be converted in a merger. *Havender* v. *Federal United Corp.*, 24 Del. Ch. 318, 11 A. 2d 331 (Sup. Ct., 1940); *Hottenstein* v. *York Ice Machinery Corp.*, 45 F. S. 436 (D. Del., 1942), aff. 136 F. 2d 944 (C. C. A. 3, 1943); *Hubbard* v. *Jones & Laughlin Steel Corp.*, *supra*; *Porges* v. *Vadsco Sales Corp.*, *supra*; *Anderson* v. *International Minerals & Chemical Corp.*, 295 N. Y. 343, 67 N. E. 2d 573 (1946); see *Wessell* v. *Guantanamo Sugar Co.*, 134 N. J. Eq. 271, 35 A. 2d 215, 216-17 (Ch., 1944), aff. *Murphy* v. *Guantanamo Sugar Co.*, 135 N. J. Eq. 506, 39 A. 2d 431 (Ct. Er. Ap., 1944). The preferred stockholder does not thereby become entitled to a money judgment. *Langfelder* v. *Universal Laboratories*, 163 F. 2d 804 (C. C. A. 3, 1947).

gan law is to the same effect,[21] but we leave that on one side to emphasize the Federal rule.

This result is required, in the first place, to give full effect to Federal policy. There is no difference, for any practical business interest of stockholders, between a merger of Pere Marquette into C&O, on the one hand, which appellants say matured their rights as provided in the liquidation preference, and a merger of C&O into Pere Marquette, on the other hand, where the corporate entity of Pere Marquette would survive and no basis would exist, however technical, for urging any liquidation of Pere Marquette. Moreover, it is settled in Virginia[22] in accord with the prevailing

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[21] Thus in *Guardian Depositors Corporation* v. *Currie*, 292 Mich. 549, 291 N. W. 2 (1940), it was said (contrary to appellants' position, Brief, pp. 8-9, nn. 2-3):

> "'. . . a consolidation of corporations, under statutes which impose all obligations and confer all rights of the constituent companies on the consolidated company, is to be regarded merely as a continuance of the old corporations, under a new name, as to the business of the old corporations. . .'
>
> ". . . the Michigan charter was not extinguished and the State corporation is not thereby dissolved. . ." (5-6)

When the business continues and no dissolution occurs, there is no winding up, and the right to stipulated treatment before the common stock out of any balance after paying creditors can not apply. The case sustained recovery by a creditor and the transaction was a consolidation of a Michigan bank, by permission of Michigan statute, with a national bank, under authority of a Federal statute. In the case at bar, the merger of the Michigan corporation was made, by permission of Michigan statute, into a Virginia corporation, under authority of a Virginia statute. Virginia follows this same doctrine (n. 22 below). Additional Michigan authorities appear in n. 7 above.

[22] *Adams* v. *U. S. Distributing Corp.*, 184 Va. 134, 150, 34 S. E. 2d 244, 251, 1945, *cert. den.*, 327 U. S. 788 (1946). The Court said:

> "It is well settled in this State that the merger of two corporations does not end the existence of either, but continues the existence of both in the merged corporation." (150)

In result, a merger does not "work a 'dissolution or liquidation' . . . within the meaning of the preferred stock clause". (151)

weight of authority,[22] that a merger works no liquidation of either constituent company. It is important for the unification policy that railroads seeking to merge shall be free to follow whichever of these two routes happens, in the facts of the particular situation, to be more economical and advantageous, without being penalized by heavy dissolution payments precipitated by choice of mere legal form.

No obligation for such a payment arises by the terms of the preference here involved. They speak only of "any liquidation, dissolution or winding up" of the Pere Marquette (App. B). Mergers, though equally familiar, are not named. Had they been intended, they would have been named. Being not intended, they can not be given the same effect as if intended unless by some rule of Michigan law. If such a rule existed, which it does not, it would so obstruct the unification program as to conflict with Federal policy. It would thus be one of the "restraints, limitations, and prohibitions" of State law from which the railroads are automatically "relieved" by Section 5(11) upon the entry of an authorizing order of the Commission. This follows *a fortiori*, as more burdensome and obstructive, from *Texas* v. *United States*, 292 U. S. 522 (1934), holding that a Texas requirement for maintenance of local offices and shops yielded to Commission authorization for their removal upon

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[22] *Windhurst* v. *Central Leather Co.*, 101 N. J. Eq. 543, 138 A. 772 (Ch., 1927), 105 N. J. Eq. 621, 149 A. 36 (Ch., 1930), 107 N. J. Eq. 528, 153 A. 402 (Ct. Er. Ap., 1931), app. dism., *Ingraham* v. *Central Leather Co.*, 76 L. ed. 1299 (1931); *Porges* v. *Vadsco Sales Corp.*, 32 A. 2d 148 (Del. Ch., 1943); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 631 (1945). *Petry* v. *Harwood Electric Co.*, 280 Pa. 142, 124 A. 302 (1924), once declaring the contrary, is no longer operative, for the act (Purdon's Pennsylvania Statutes Annotated, Title 15, Sec. 2852-908) was amended (Mar. 31, 1941, P. L. 13, No. 7A) to make exclusive the appraisal remedy of "fair value of his shares as of the day prior to the date on which the vote was taken".

acquisition of control by a foreign road. The expanding powers of the Commission under the successive amendments to Section 5 were stressed, even though prior to the 1940 amendment, in these words:

> "These broadening provisions of the Emergency Railroad Transportation Act, 1933, confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920. . . . To attain that end, new rights, new obligations, new machinery, were created. . . . It is a primary aim of that policy to secure the avoidance of waste. . . . The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. . . ." (530-1)[34]

But this need not be faced as a new point, either in terms of policy or in terms of superseding State restraints, for it has been settled by decisions of this Court in terms of the governing standard itself. It is settled that the "fair and equitable" standard is a matter of Federal law, to be interpreted consistently with the classic standard of the Federal equity courts, both as used in the Bankruptcy Act (*Vanston Bondholders' Protective Committee* v. *Green*, 329 U. S. 156, 1946) and in the Public Utility Holding Company Act (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 1945). The "just and reasonable" standard, being identical, as we have shown (p. 27 above), has the same standing.

The holding of the *Otis Case* was that a stipulated liquidation preference, admittedly valid under State law, was not controlling for fair and equitable treatment and a Commission order recognizing old common stock was thus not in-

[34] See also *In re New York, New Haven & Hartford R.*, 147 F. 2d 40, 52 (C. C. A. 2, 1945), *cert. den.*, 325 U. S. 884 (1945).

validated by its failure to give the preferred present value equal to its stipulated liquidation preference. The ground of the decision was that the applicability of the charter provision under the fair and equitable standard was "a matter of Federal law" (636), from which it follows that the Commission was empowered to treat the

> "rights of the preferred stock to $6 annual cumulative dividends in the going business and to full priority in liquidation other than by operation of the Act . . . as factors in valuation rather than determinative of amounts payable. . ." (631-32)

In that case the form of the transaction was that of a typical liquidation, but the Court reasoned that fair and equitable treatment was not controlled by mere form of legal technique, since the same result could have been achieved by merger and "merger . . . would avoid the liquidation" (631, 637-38). The holding is decisive here.

The *Vanston Case* held that an indenture covenant for payment of interest on interest in arrears, even if valid under State law, need not be recognized under the fair and equitable standard of the Bankruptcy Act, because in conflict with "the equitable principles" governing distributions thereunder (163), since they embody a policy of "uniformity, ratable distribution and fairness and equity" (165).

Along the same line, it was held in *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 89 (1943), that "fair and equitable" was an evolving concept that might be given new meaning by a Federal agency according to its own views without being bound by "settled judicial precedents", even when determining the treatment to be given stock created, issued and purchased under State law. When the case came up again,[*]

[*] *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194 (1947).

after further administrative action, the Commission's order was sustained, though its denial of equal recognition to old preferred stock purchased by company officers was admittedly beyond justification by any rule of State law, under which the corporation was organized, the stock issued and the purchases made. These are, after all, but applications to the particular standard here involved of the classic rule that the terms of Federal legislation are to be interpreted as a matter of Federal law, though a different conclusion might follow under the law of the particular State (*Cleveland, C., C. & St. L. R.* v. *United States*, 275 U.S. 404, 1928).

The *Otis Case* is not to be distinguished on the ground that it applies an affirmative policy of the Congress, eventuating in an affirmative command by the Securities and Exchange Commission. It is concerned, none the less, with the meaning of the same standard that governs here. Moreover, no such affirmative requirement was involved in the *Vanston Case*. There the Congress merely provided an equitable rule for the distribution of value in an enterprise choosing to avail of the procedures of the Act. That is the case here. Furthermore, dealing with railroads, as the Interstate Commerce Act does, it proclaims Federal policy of exceptional force for the maintenance of such rules as will best facilitate widespread unifications into more efficient instruments of transportation. One of the most natural expectations of the Congress in such a context is that each constituent company would, from the intensely practical point of view of fair treatment, continue in business. If, indeed, the question were to be decided, not on these broad grounds of policy, but in terms of legal technique, Section 5(11), as enlarged by the 1940 amendment, now conveys an express grant of corporate power to accomplish anything authorized by Commission order, and that may well be taken as a Congressional mandate for any form of corporate power to

merge that will permit the just and reasonable standard to be applied on a practical basis."

We submit, therefore, that, without regard to the law of Michigan, the Commission was not only authorized, but bound, to act, as it did, on the premise that the stated dissolution preference was not in itself controlling.

It is a late hour for appellants (Brief p. 14) to raise constitutional objections to this result (*Louisville & Nashville R. v. Mottley*, 219 U. S. 467, 1911). No constitutional objection can be made to fair treatment, irrespective of consent (*Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R.*, 328 U. S. 495, 533, 1946). Even creditors may be satisfied with stock, rather than cash, not only where the company is insolvent (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul Pacific R.*, 318 U. S. 523, 563-4, 1943) but also where it is solvent (*In re Standard Gas & Electric Co.*, 151 F. 2d 326, 329, C.C.A. 3, 1945, *cert. den.*, 327 U. S. 796, 1946). *A fortiori* this can be done to stockholders.

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*Section 5(11) does not "create or provide for the creation, directly or indirectly, of a Federal corporation", but that is not to say that it may not continue a pre-existing State corporation, still less that it does not confer corporate power to merge in such manner as to avoid "liquidation, dissolution or winding up." It provides in terms that "any power granted by this section to any carrier . . . shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State." The effect of these words, as an independent Federal grant of additional power to a State corporation, was made clear in the hearings:

> "Mr. Fletcher—The purpose of this section here is to have the Congress confer corporate power upon the railroads to consummate the plan which the Interstate Commerce Commission has approved." (Hearings before House Committee on Interstate and Foreign Commerce on H. R. 2531 and H. R. 188, 76th Cong., 1st Sess. (1939) 683; see Hearings before Senate Committee on Interstate Commerce on S. 1310, S. 2016, S. 1869 and S. 2009, 76th Cong., 1st Sess. (1939) 114-5)

4. *No Rule of Law Entitled Dissenters to Different Treatment*

Since the purpose of the standard of fairness is to provide an equitable equivalent of the old security, the rights of claimants are to be determined by the nature of their old security, and not by their personal feelings. This has long been the rule in the practical administration of the Bankruptcy Act:

> ". . . the classification should in nowise depend upon the nature of the claimant or his interest in the sense of his bias or leanings, but only upon the nature of the claim." (*J. P. Morgan & Co.* v. *Missouri Pacific R.*, 85 F. 2d 351, 352, C.C.A. 8, 1936, *cert. den.*, 299 U. S. 604, 1937, arising under Section 77.)

Specifically this means that the state of mind of a security holder is not a pertinent circumstance in shaping the Commission's duty, even though that state of mind be communicated in a formal dissent, but the controlling test remains the worth of his old security in all the circumstances (*Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R., supra*, at p. 535). In all the railroad reorganization cases no approved plan gives any different treatment to dissenters."

As the act of dissent does not remove the dissenter to a favored class, by the same token no consequential remedy given him by State law can do so. This applies to any procedure under State law for the recovery of cash, for that adds no new substantive right to the agreed terms of the stock,

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"Permission for alternative consummation through sale, if authorized by court order, was included in most plans, and had it been availed of, dissenters would have had an opportunity to take their distributive share of the proceeds of sale in cash (rather than the securities given to assentors), but in fact that permission was never availed of in any case.

but only provides a State remedy for protection of those same terms in certain circumstances. While, by the weight of authority,[28] no such right exists except by appraisal proceedings expressly created by statute, we need not pause here to identify Michigan law in this respect.[29] It is sufficient here to observe that, from the point of view of State law, the Commission obviously has no authority to enforce these alternative remedies and, from the point of view of Federal law, they are, as mere alternative remedies, irrelevant to the "just and reasonable" standard. This follows from the discussion in 3 above, and is additionally required in this instance by the fact that no other result could supply a workable administrative rule.

On the other hand, as stockholders gain no additional rights, from the point of view of the Commission's duty, by dissenting, so they lose none by voting for the merger, as appellants urge (Brief, p. 20).[30] Section 5(11) requires specified assent of stockholders ("a majority" or "whatever different vote is required under applicable State law"), and does not blacklist such assentors from the Commission's protective scrutiny. Were they, in the view of the Act, to lose any rights by assenting, there would be no standard left to guide the Commission's action in their regard and nothing left for it to determine. The Congress could hardly have planned to facilitate unifications by denying protection to those who vote for them, and confining protection to those

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[28] Securities and Exchange Commission, "Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees", Part VII, "Management Plans without Aid of the Committees" (1938, pp. 542-43).

[29] Michigan presumably follows the majority rule, for it has cited with approval a leading case for that rule (see n. 7 above).

[30] A very different situation comes into being after the Commission acts and the merger is consummated. Stockholders then surrendering their stock in conversion undoubtedly relinquish any right to object.

who oppose. The statutory scheme here, just as in the Bankruptcy Act and the Public Utility Holding Company Act, must be that the Commission has full responsibility to determine just and reasonable terms for all security holders irrespective of consent. The Commission's finding as to fairness is thus equally applicable to all holders of Pere Marquette Preferred, whether assenting, non-assenting or dissenting.

From either point of view, therefore, it was the Commission's duty to treat all holders of Pere Marquette Preferred on the same basis. This is just what it did. The extent of their approval or disapproval in no way limited the scope of its duty, the Commission said, for it had to make the required findings "if not a single share be in dissent" (R. 40). Exploring all pertinent factors of stipulated priority and investment worth, the Commission reached its conclusion that the award of new securities was "just and reasonable". Refusing then to require any other or different treatment, the Commission made its statement, so misinterpreted by appellants, that:

> "In reaching the conclusion that the terms and conditions proposed by the applicant are just and reasonable, we have undertaken to do this [give them close scrutiny]; and, having reached that conclusion, performance of our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike." (R. 54)

To call this a holding that all may be denied just and reasonable treatment so long as all are treated alike (Appellants' Brief, pp. 20-21) is a play on words. Read simply, the words say, and the substance shows, that like treatment suffices only when that treatment is intrinsically just and reasonable, which the Commission had just found it to be.

5. *Conclusion*

The Commission, therefore, we submit, did its full duty to assure "just and reasonable" treatment by an administrative evaluation of all the stipulated priorities in the light of all the pertinent facts and its action, being in accord with legal standards, is conclusive.

II.

Possible Recoveries Under State Procedure Are Not in Issue Here

We have shown above that the Commission took into consideration all the stipulated priorities of the Pere Marquette Preferred and evaluated them in the light of all the pertinent facts to find their equitable equivalent in new securities; and that it was free to exercise its informed discretion on this basis without being required by law to accord controlling weight to the stipulated dissolution preference or to provide favored treatment for dissenters. We turn now from these substantive rights, which were to be converted under the "just and reasonable" procedure of Federal law, to the altogether different subject of alternative procedures possibly created by State law to afford realization on these same substantive rights.

Since the Commission's function is to enforce the remedial procedure appointed by the Congress, it may well seem irrelevant to ask what remedial procedures are contemplated by State law. That is just our point here. It is just what the Commission said:

> "Whether dissenting stockholders, as members of a class created by the merger, are entitled to *better treatment* under their charter contract with the Pere Marquette is a question not within our province to decide. . . ." (R. 54, italics added)

We must, of course, "read text in the light of context" (*S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 351, 1943). The Commission had just finished its discussion of the treatment of security holders, and had just stated its ultimate conclusion that the proposed treatment was "just and reasonable" (R. 52). It then took up, under the new heading "Jurisdiction", the contentions pressed upon it with respect to State-created remedies. Concretely, these could be of only two kinds, either a statutory proceeding for appraisal and payment in cash or a suit in equity or action at law to recover a money judgment. Such remedies were asserted most conspicuously by appellants, who claimed a privilege to recover, through such means, cash or its equivalent equal to their stipulated dissolution preference. So far as this may include any assertion of substantive right under State law, it has been dealt with adequately above, for the Commission considered it, among all other substantive rights, and the Federal standard does not allow it controlling effect. So far as it embodies a procedural claim, we discuss it now, as did the Commission.

The obvious meaning of the Commission, accordingly, is that, if stockholders are entitled to obtain better than "just and reasonable" treatment by virtue of any surviving procedure under State law, that is a question for the courts to determine when such procedure is invoked, and not within the "province" of the Commission to decide in a proceeding for enforcement of the Federal remedy. However "inclusive" be the Commission's power on the subjects confided to it (*Rochester Telephone Co.* v. *U. S.*, 307 U. S. 125, 142, 1939), this gives it no power to deal with other subjects, still less to enforce remedial devices of State law differing from the Federal remedy (*Pittsburgh & W. Va. R.* v. *U. S.*, 281 U. S. 479, 1930). The Commission's statement, drawn from the *Big Four Case* (p. 25 above), that objecting stockhold-

ers "have the right to present their case before two tribunals, both charged with the duty of protecting their interests" (Appellants' Brief, p. 18) presupposes, of course, that each tribunal functions within the scope of its jurisdiction. The Commission functions within the scope of its jurisdiction when it applies the "just and reasonable" standard. A reviewing court functions within its jurisdiction when it determines whether Commission action was within its power. If stockholders wish to initiate some different action under State law, beyond the scope of this issue, as in *Otis & Co.* v. *Pennsylvania R.*, 61 F. S. 905 (E. D. Penn., 1945), and other cases cited by the Commission, they must resort to whatever may be the tribunal having jurisdiction to entertain and determine such a case.

Thus no "inconsistency" (Appellants' Brief, p. 18) remains, once the true nature of the action taken here by the Commission is identified. Nor does any "bifurcated or trifurcated jurisdiction" (Appellants' Brief, p. 29) result in such manner as to impede the orderly accomplishment of Federal policy. The contemplation of the Act is precisely that any tribunal shall do only what it has authority to do.

The Commission's authority being limited to the enforcement of "just and reasonable" treatment, it rightly did nothing whatever with respect to possible alternative remedies under State law. It did not decide that such remedies were available, or that they were not available, or that any particular result might be obtained by following them if available. And it took no action to enlarge or restrict any such potential remedies. That being so, the Report in this respect is, at most, no more than a recital that such remedies may possibly exist. But mere recitals are not reviewable here, for this Court sits only to correct action that is without warrant in law, not to refine administrative recitals that have no operative effect by changing rights or granting or with-

holding a legal privilege. *Delaware & Hudson Co.* v. *U. S.*, 266 U. S. 438 (1925); *U. S.* v. *Los Angeles R.*, 273 U. S. 299 (1927); *U. S.* v. *Kansas City Southern R.*, 275 U. S. 500 (1927).

We have now said that the Commission (*i*) had no authority to enforce, or give effect to, State-created remedies and (*ii*) properly took no action whatever in that regard. That we believe sufficient for the purposes of this case. But, for fuller answer to appellants' arguments, we go on to point out that this is true no matter what interpretation may be ultimately given to Section 5, particularly its grant of "exclusive and plenary" authority, whether the result be to supersede all alternative remedies previously available under State law or not. It may, of course, be argued, on the one hand, that, since the Congress has appointed the Commission to enforce "just and reasonable" treatment for all stockholders in railway unifications, its policy precludes any State tribunal from trying its own hand at that task by different procedure, differently administered and culminating in the different award of a cash payment. On the other hand, it may be argued that the Congress, specifically disclaiming any intention to create Federal corporations (paragraph (11) of section 5), and choosing rather to supervise and encourage unifications by voluntary action on the part of State corporations, left in force any obligation for cash payment to dissenters annexed by State legislation as a condition to the merger privilege, at least in cases where the potential burden of the payment would not be so large as to impair the railroad's capacity for continued efficient public service. This argument is supported by the Commission's uniform administrative practice to leave State appraisal rights operative in cases of merger or consolidation.[21] But that issue does not arise here and need

[21] See n. 16 above.

not, therefore, be decided. No one is here seeking, and no one could seek here, to enforce an appraisal right or any other alternative remedy under State law. The question whether any such remedy still exists can be determined only where it is, or shall be, asserted.

Obviously Section 5, in adopting the historical canon of equity practice, did not itself impose on the Commission any duty to administer State remedies, for that would defeat the uniform operation of the Federal standard and leave it at the mercy of differing State procedures, just as had been the case before 1920 in the issuance of securities, where it was the acknowledged purpose of Section 20a to substitute a single Federal pattern. Nor could State law, *ex proprio vigore*, thrust such a duty on the Commission in contravention of Federal enactment. So the Commission, in applying the Federal criterion of "just and reasonable" treatment, had no need to forecast the probable results that might be reached through any such alternative State procedure. Moreover, the Commission had no duty here to arrest or terminate any alternative State procedure, for the following reasons:

1. If it be the design of Section 5 to occupy the whole field of security holder treatment and thus supersede State remedies, then that result ensues by operation of Section 5 itself, either from the time of its enactment or at least upon the entry of an authorizing order of the Commission, by automatic operation of law, without need for the Commission to say so.

2. Alternatively, it may be the design of Section 5 (seeking, as it manifestly did, to leave State legislation in effect so far as could be accommodated with the national aim) to invest the Commission with discretionary authority according to the facts of the particular situation. If so, there is evidence here to support the Commission's abstention from

such foreclosure. The shares dissented within the 3 months' period provided by the Merger Agreement and the Virginia statute, computed on the highest imaginable basis (in the case of the Preferred Stock, at its stated liquidation preference) would require far less cash than amounts which the Commission found "will not involve a burden of excessive expenditure" (R. 55-56). While preponderant reasons make for the result that the class of possible dissenters closed at the expiration of the 3 months' period, there is no need to invoke them here, for in the meantime so many holders have surrendered their old stock in final conversion that the amount now outstanding is only a minor fraction of the potential dissent envisaged and considered by the Commission. Specifically, the unsurrendered shares of Pere Marquette of all classes, computed on the highest imaginable basis (that is, the book value found by the Commission, R. 55, including, as stated above, the Preferred Stock at its stated liquidation preference) aggregate only 39.5% of the sum which the Commission found would "not involve a burden of excessive expenditure". This finding means that, while appraisal rights might in the abstract loom so large as to "frustrate" Federal policy (R. 53 and Appellants' Brief, p. 18), they are not sufficient to do so here, but on the contrary are too small to be significant in the present case and thus need not be superseded as a "restraint" of State law. An estimated maximum is adequate basis for authorizing assumption of obligation and liability, even if such a litigation claim were to be deemed an "obligation or liability . . . in respect of the securities of any other person" within the meaning of Section 20a (Appellants' Brief, pp. 21-23).

Quite apart from all these considerations, appellants can not complain that the Commission took no action to foreclose possible State remedies, for the result, at most, is only to leave them with an additional remedy they would not

otherwise have had. This is no injury. Litigants will not be heard to complain except of some injury to them. *I. C. C.* v. *Chicago, Rock Island & Pacific R.*, 218 U. S. 88, 109, (1910); *Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 147-8, (1923); *Sprunt & Son* v. *U. S.*, 281 U. S. 249, 251-7, (1930).

The only other point of interest in this connection is that the Commission, not needing to take State procedures into account in its determination of "just and reasonable" treatment, actually did not do so. Our point here is that, whatever may have been the Commission's expectations with respect to alternative remedies under State law, they did not in any way influence its administrative determination of "just and reasonable" treatment, so their validity is not a condition to the finality of its order. It is clear, as a matter of reasoning, that the Commission could not possibly have given weight to these potential remedies, for it made no effort to determine whether any such remedy was actually available, still less to determine what it would actually yield on prosecution, if available, but only the maximum that it conceivably might yield. No weight could have been given to unascertained possibilities. But we are not left to reason alone. The Commission has disclosed the full basis for its administrative approach. The rule applied was to be sure the proposed treatment is "just and reasonable" and that everyone can get it, that is to

> "make certain that all stockholders of the same class are to be treated alike" (R. 54).

All holders of Pere Marquette Preferred were viewed (I, 4 above) as being in "the same class" and manifestly those who voted for the merger could not thereafter attack it and recover cash. "Like" treatment, therefore, means like allocation of new securities. In other words, the possibility

of cash recovery by dissenters under State procedure was not counted as an element in their "just and reasonable" treatment. For dissenters, as well as assentors and non-assentors, the Commission looked to a "just and reasonable" award of new securities and held that all stockholders were treated properly when all were given a right to receive it, with no discrimination against non-assenting minorities.

The Commission, therefore, was altogether uninfluenced by possible State remedies in its application of the Federal standard, which alone was its responsibility. Possible remedies of that kind, therefore, are not only not in issue here, but also have no pertinence to anything that is in issue here.

CONCLUSION

The order of the Court below should, therefore, be affirmed.

Dated December 26, 1947.

Respectfully submitted,

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Company and Alleghany Corporation.

APPENDIX A

EXCERPTS FROM SECTIONS 5 AND 20a OF THE INTERSTATE COMMERCE ACT, AS AMENDED

Sec. 5. (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity

for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a

railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be

entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

* * * * * * *

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

* * * * * * *

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

* * * * * * *

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State

law in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

(12) If any provision of the foregoing paragraphs of this section, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

(13) As used in paragraphs ~~(2)~~ to (12), inclusive, the term "carrier" means a carrier by railroad and an express

company, subject to this part; a motor carrier subject to part II; and a water carrier subject to part III.

* * * * *

SEC. 20a. (1) That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general system railroad system of transportation) which is subject to this part, or any corporation organized for the purpose of engaging in transportation by railroad subject to this part.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform

that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

* * * * * * *

(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in

accordance with the provisions of this section without securing approval other than as specified herein.

* * * * * *

(10) The Commission shall require periodical or special reports from each carrier hereafter issuing any securities, including such notes, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds thereof.

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. . . .

APPENDIX B

MICHIGAN RAILROAD, BRIDGE AND TUNNEL COMPANIES ACT, AS AMENDED

(Act No. 198 of the Public Acts of 1873, Article 2, Sections 29-30, as last amended by Act No. 4 of the Public Acts of 1946; Michigan Statutes Annotated (1946 Cum. Supp.) Sections 22.233-4)

SEC. 29. Subject to the approval of the interstate commerce commission in any case where that commission has jurisdiction and in all other cases subject to the approval of the Michigan public utilities commission, any railroad company organized under the laws of this state, or under the laws of this state and any other state or states or country, and owning or operating, or authorized by its charter to construct or acquire, a railroad forming a continuous or connecting line with that of any other railroad company, or companies, may consolidate with such other company or companies, or may merge or be merged into any such other company, so that said companies shall thereafter be a single corporation. The directors of said 2 or more companies or corporations may enter into an agreement under the corporate seal of each corporation, for the consolidation or merger of the said 2 or more corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation in the case of a consolidation or of the corporation that is to survive in the case of a merger; the numbers of the directors thereof, and in case of a consolidation the names of those who shall be the first directors of the new corporation, which shall be deemed and taken to be the first election of the directors of the new company, which number shall not be less than 5 nor more than 15; the time and place of holding the first elec-

tion of directors of the new corporation after the consolidation, which time shall not exceed 6 months after such consolidation has been sanctioned by the stockholders of said 2 or more corporations, as hereinafter provided; the number of shares of capital stock which the new or surviving corporation is authorized to have; the amount of its authorized capital stock, which amount shall be the aggregate par value of all authorized shares having par value, plus the aggregate amount of value placed in the agreement of consolidation or merger upon all authorized shares of non-par value; the classes of stock authorized, any of which classes may be with or without nominal or par value, with such designations, relative rights, preferences, conditions, limitations, restrictions and voting rights as shall be specified; the number of shares of each class having par value, with the par value of each share; the number of shares of each class having no par value, with the value placed upon each share of each class, and the consideration for which the company may issue and sell such shares, or authorization to the board of directors to fix such consideration from time to time, which consideration shall in no event be less for any such share than the value placed thereon in the agreement of consolidation or merger,—and when the consideration for which any such share was authorized to be issued shall have been received by the company such share shall be deemed to be fully paid and non-assessable; the manner of converting the capital stock of each corporation into the capital stock of the new or surviving corporation, or the manner of otherwise disposing of said capital stock; with such other details as they shall deem necessary to perfect such consolidation or merger: Provided, however, That in case of a merger it shall not be necessary for such agreement to contain the provisions above specified with regard to directors and capital stock of the surviving corporation

unless, and then only to the extent that, changes in respect to such matters are to be made by such merger agreement; and such new or surviving corporation shall possess all the powers, rights and franchises conferred upon the 2 or more corporations that are parties to such agreement: Provided, however, That any power, right, franchise, privilege or immunity possessed by either or any of the consolidating or merging companies of a kind which would not be possessed by a company organizing originally under the provisions of this act, as now existing or as hereafter amended, shall be utterly lost, annulled and abrogated; and such new or surviving corporation shall be subject to all the restrictions and perform all the duties imposed by this act as now existing or as hereafter amended as if it were a corporation originally organized thereunder. Such agreement of the directors shall not be deemed to be the agreement of the said 2 or more corporations until after it has been submitted to the stockholders of each of said corporations separately at a meeting thereof, to be called upon a notice signed by the secretary or assistant secretary of the corporation, stating the purpose of the meeting, and published at least once in each week for 4 successive weeks in 1 daily newspaper, if any there be, published in the place where each corporation maintains its principal office within the state, the first publication to be at least 60 days before the time specified for the meeting, nor until it has been sanctioned by a majority vote of the stockholders of each class of stock having voting powers, each share entitling the holder thereof to 1 vote, which vote may be cast by the holder in person or by proxy; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders separately, in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said 2 or

more corporations. A copy of such agreement of consolidation or merger filed in pursuance of this act, and the acts amending or revising the same, with the secretary of state, and certified by him to be a copy, shall in all courts and places be presumptive evidence of the consolidation or merger, as the case may be, of said 2 or more companies, and of all the facts therein stated: And provided, That any railroad bridge company, or any railroad tunnel company, which may be organized under this act to bridge or tunnel the Detroit river, or the St. Clair river, or any of the waters in the jurisdiction of this state, shall have a right to consolidate the stock, property and assets of said company with the stock, property and assets of any connecting railroad company or of any company organized or to be organized under the laws of this state, or which may be created under the laws of any adjacent state or country, to construct any such bridge or tunnel therewith, or to merge or be merged into any such other corporation, in the manner in this section above provided, upon such terms, conditions and agreements as may by the said corporations be deemed just and equitable: Provided, That every such bridge or tunnel shall be so constructed as not to be a material obstruction to navigation.

SEC. 30. Upon the approval by the interstate commerce commission or the Michigan public utilities commission, as the case may be, of any agreement of consolidation or merger provided for in the preceding section twenty-nine, a duplicate of said articles of agreement shall be filed in the office of the secretary of state; the said two or more corporations, parties to said agreement shall thenceforth be one corporation as provided in such agreement, to be known by the corporate name therein provided, and the details of such agreement shall be carried into effect as provided therein.

And all and singular the powers, rights and franchises of each and all of such two or more corporations, parties to such agreement, of a kind which would be possessed by a company organized under the provisions of this act as now existing or as hereafter amended, and all and singular their rights and interest in and to every species of property and things in action, shall be deemed to be transferred to and vested in, or to remain vested in, such new or surviving corporation, without any other deed or transfer; and such new or surviving corporation shall hold and enjoy the same, together with all the right of way, and all other rights of property, in the same manner and to the same intent and as effectually as the same were formerly held and enjoyed by said two or more corporations, parties to such agreement; and the titles and real estate acquired by any of said two or more corporations shall not be deemed to revert or be impaired because of anything in this act contained or anything done by virtue thereof: *Provided,* That all rights of creditors and all liens upon the property of any of said corporations, parties to the said agreement, shall be and hereby are preserved unimpaired, and the respective corporations shall be deemed to continue to exist so far as may be necessary to enforce the same: And *provided further,* That the debts, liabilities and duties of each and all of said companies, parties to said agreement shall thenceforth attach to such new or surviving corporation, and be enforceable against the same, to the same extent, and in the same manner as if such debts, liabilities and duties had been originally incurred by it.

APPENDIX C

VIRGINIA MERGER STATUTE

(Sections 3821-3822 of the Code of 1919 as last amended by the Acts of 1944; pages 7 and 528. Sections 3822-a and 3822-b, in regard to dissatisfied stockholders, appear at R. 175.)

SEC. 3821. *When merger or consolidation may be effected.*—Except as any merger or consolidation is prohibited by sub-section (e) of section thirty-eight hundred fifty-seven, and sub-section (e) of section thirty-eight hundred sixty-six, any corporation not under patronage or control of the State, organized or to be organized under any law or laws of this State, whether it be a corporation having capital stock or a non-stock corporation other than one organized for social purposes only, may merge or consolidate in the manner prescribed in section thirty-eight hundred twenty-two of the Code as amended into a single corporation with any other corporation organized for the purpose of carrying on the same or a similar business or for the same or similar purposes under the laws of this or any other state of the United States, or under the laws of the United States; and corporations organized for social purposes only may merge or consolidate in the same manner, except that the merger or consolidation of such corporations shall be by unanimous vote of the members by whatever name called having voting power at a meeting legally called for the purpose of considering and voting in person or by proxy on an agreement for merger or consolidation. Any such merged or consolidated corporation shall, upon the payment of a proper charter fee, thereby become a domestic corporation of this State and be subject to its laws, and to the jurisdiction of its courts, and may be either one of the merging or consolidating corporations, or a new corporation to be formed by means of the

merger or consolidation; and by virtue of this chapter, and the proceedings had pursuant thereto, the corporations shall be consolidated and merged, so that all property, rights, franchises, and privileges by law vested in each corporation so merged or consolidated shall be transferred to and vested in the corporation formed by the merger or consolidation.

In the case of corporations having no capital stock the provisions of this chapter prescribing procedure for the merger or consolidation of corporations shall be followed as far as applicable, and the directors, managers, trustees or members of the governing board however called may take the action required of the board of directors of stock corporations, and the members of the corporation such action as is required of stockholders, but non-stock corporations organized for social purposes only may merge or consolidate only by unanimous vote of the members of each of the constituent corporations. No dissatisfied member of a non-stock corporation shall be entitled to recover anything from the corporation on account of the merger or consolidation. (1902-3-4, p. 437; ch. 5, sec. 40; 1904, p. 91; 1944, p. 7.)

SEC. 3822. *Manner of consolidation or merger; recordation; when effective; issue of stock and bonds; when merger complete.*—(a) Such consolidation or merger shall be made in the following manner and under the conditions, provisions, restrictions, and with the powers following, that is to say: (1) The board of directors of the several corporations proposing to merge or consolidate may enter into a joint agreement under the corporate seals of their respective corporations for their merger or consolidation prescribing the terms and conditions thereof, the mode of carrying same into effect, the name of the new corporation (if it be proposed to form a new one), or of the merged or consolidated corporation, as the case may be; the number, names, and

places of residence of the directors and principal officers of the new or consolidated corporation (who shall hold their offices until their successors be chosen or appointed either according to law or according to the by-laws of the corporation); the aggregate principal amount and the rate of interest of the bonds, if any, and the number of shares of the capital stock, with the par value of each share proposed to be issued in connection with the merger or consolidation by the new or consolidated corporation, and if the capital stock is to be divided into classes, the classes thereof, with the terms on which issued; the manner of converting the capital stock of each of the merging or consolidating corporations into the stock or obligations of the new or consolidated corporation, and in case of the creation of a new corporation how and when the directors and principal officers to succeed those named in the agreement are to be chosen or appointed; together with all such other provisions and details as to the board of directors entering into the agreement seem necessary or convenient to perfect the proposed merger or consolidation; (2) The agreement shall be submitted to the stockholders of each of the merging or consolidating corporations separately, at a meeting called for the purpose of taking same into consideration; of the time, place, and general object, of which meeting due notice shall be given by publication at least six times a week, for two successive weeks, in a newspaper published in the place where the principal office in this State of the corporation is located, or having a general circulation therein, and by mailing a copy of the notice at least ten days prior to the meeting to the last known postoffice address of each of the stockholders of record; and at the meeting such agreement shall be considered, and a vote by ballot, in person or by proxy, shall be taken for the adoption or rejection thereof, each share entitling the holder thereof to one vote; and if a majority of

all the votes cast at each of such meetings be in favor of the agreement, consolidation, and merger, that fact shall be certified by the president or one of the vice-presidents of the corporation under the corporate seal, attested by the secretary, and the certificates, duly acknowledged by those signing the several certificates and attesting the several seals, before an officer authorized by the laws of this State to take acknowledgements of deeds, together with a copy of the agreement, shall be presented to the State Corporation Commission which shall ascertain and declare whether the applicants have, by complying with the requirements of the law, entitled themselves to the merger or consolidation applied for, and shall issue or refuse a certificate thereof accordingly.

(b). If it be issued the agreement and certificate, with the order thereon of the Commission, shall be forthwith admitted to record in the office of the Commission, certified to the clerk of the proper court, forwarded for recordation in his office and returned for lodgment and preservation in the office of the Commission, as in the case of original certificates of incorporation, or in the case of articles of association recorded only in the office of the Commission.

(c) When such certificate has been so admitted to record in the office of the Commission, the merger or consolidation shall be complete and the merged or consolidated corporation may proceed to carry out the details of the merger and consolidation according to the terms of the agreement and to transact and carry on the business for which it was formed; but no stock or bonds shall be issued by the merged or consolidated corporation until the provisions of section one hundred sixty-seven of the Constitution, so far as applicable thereto, have been complied with. (1902-3-4, p. 437; ch. 5, sec. 41; 1922, p. 625; 1944, p. 528.)

APPENDIX D

ARTICLE IV OF THE ARTICLES OF ASSOCIATION OF PERE MARQUETTE RAILWAY COMPANY.

(DEFINING THE TERMS OF THE CAPITAL STOCK)

The number of shares of which the stock shall consist is seven hundred seventy-six thousand, eight hundred forty-two (776,842), and said shares shall be of the amount of $100 each.

Said capital stock shall be divided into Prior Preference Stock to the amount of eleven million, two hundred thousand dollars ($11,200,000); Preferred Stock to the amount of twelve million, four hundred twenty-nine thousand dollars ($12,429,000); and Common Stock to the amount of fifty-four million, fifty-five thousand, two hundred dollars ($54,055,200).

Dividends upon the Prior Preference Stock, upon the Preferred Stock and upon the Common Stock shall be paid out of the net income for any fiscal year or the surplus of said corporation, but only when and as declared by the board of directors, and on such dates as may be fixed by the by-laws or as determined by said board.

Holders of the Prior Preference Stock shall be entitled to receive cumulative preferential dividends at the rate of five per cent. per annum from April 1, 1917, in priority to any dividends upon the Preferred Stock or upon the Common Stock, and no dividends shall be paid upon the Preferred Stock or upon the Common Stock in any fiscal year or declared or set apart for payment in any fiscal year unless all accumulated dividends upon the Prior Preference Stock for all previous fiscal years shall have been paid and full divi-

dends thereon for the current and all preceding dividend periods of such fiscal year shall have been paid or declared and set aside for payment in such fiscal year. The Prior Preference Stock shall not be entitled to any other or further dividends. The entire amount of the Prior Preference Stock, but not any part thereof less than all, shall be redeemable at par plus the cumulative dividends accrued and unpaid thereon on such notice as the board of directors of said corporation may determine at the time of issue. All dividends upon Prior Preference Stock called for redemption shall cease from and after the date fixed for the redemption thereof and specified in the notice calling such Prior Preference Stock for redemption. In the event of any liquidation, dissolution or winding up, whether voluntary or involuntary, of said corporation, the holders of the Prior Preference Stock shall be entitled to be paid in full out of the assets of said corporation the par amount of their shares and all accumulated dividends unpaid thereon before any amount shall be paid out of said assets to the holders of the Preferred Stock or of the Common Stock, but the holders of the Prior Preference Stock shall not be entitled to any other or further distribution of assets.

Holders of the Preferred Stock shall be entitled to receive preferential dividends at the rate of five per cent. per annum from April 1, 1917, in priority to any dividends upon the Common Stock. The Preferred Stock shall not be entitled to any other or further dividends. The dividends on the Preferred Stock shall be cumulative from and after January 1, 1919. No dividends shall be paid upon the Common Stock in any fiscal year or declared or set apart for payment in any fiscal year unless all accumulated dividends upon the Preferred Stock for all previous fiscal years or portions thereof from and after January 1, 1919, shall have been paid or de-

cleared and set aside for payment, nor unless full dividends upon the Preferred Stock for the current and all preceding dividend periods of such fiscal year shall have been paid or declared and set aside for payment in such fiscal year. The entire amount of the Preferred Stock, but not any part thereof less than all, shall be redeemable at par plus the cumulative dividends accrued and unpaid thereon on such notice as the board of directors of said corporation may determine at the time of issue. All dividends upon Preferred Stock called for redemption shall cease from and after the date fixed for the redemption thereof, and specified in the notice calling such Preferred Stock for redemption. In the event of any liquidation, dissolution or winding up, whether voluntary or involuntary, of said corporation, the holders of the Preferred Stock shall be entitled to be paid in full out of the assets of said corporation the par amount of their shares and all accumulated dividends from and after January 1, 1919, unpaid thereon before any amount shall be paid out of said assets to the holders of the Common Stock, but the holders of the Preferred Stock shall not be entitled to any other or further distribution of assets.

After all accumulated dividends upon the Prior Preference Stock and after all accumulated dividends from and after January 1, 1919, upon the Preferred Stock shall have been paid for all previous fiscal years, and after full dividends upon the Prior Preference Stock and upon the Preferred Stock for the current and all preceding dividend periods of the current fiscal year shall have been paid or declared and set aside for payment in such fiscal year, the holders of the Common Stock shall be entitled to receive all further amounts that may be distributed in that current dividend period of such fiscal year.

The capital stock of said corporation may from time to time be increased as may be then permitted by law, and such

increased stock may be wholly or partly Prior Preference Stock, Preferred Stock or Common Stock, or any other class of stock then authorized and permitted by law.

In addition to any requirements of law at the time in force, said corporation shall not, unless with the consent of the holders of all its outstanding stock, create any mortgage or deed of trust upon its property or any part thereof, except after there shall have been given at a meeting of the stockholders called for that purpose the consent of the holders of a majority of the whole amount of Prior Preference Stock outstanding, the consent of the holders of a majority of the whole amount of Preferred Stock outstanding, and the consent of the holders of a majority of such part of the Common Stock as shall be represented at such meeting, the holders of each class of stock voting separately.

Holders of Prior Preference Stock, of Preferred Stock and of Common Stock shall have the same right of subscription to any shares of stock of said corporation, whether Prior Preference, Preferred or Common, or stock of any other class, which said corporation may at any time issue or sell, in proportion to the respective amounts of Prior Preference Stock, Preferred Stock and Common Stock outstanding, and in all respects as if the entire outstanding stock of said corporation were all of one class.

APPENDIX E

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

SUPPLEMENTAL

CERTIFICATE OF NOTIFICATION TO THE INTERSTATE COMMERCE COMMISSION OF SECURITIES SOLD, PLEDGED, REPLEDGED, OR OTHERWISE DISPOSED OF, REQUIRED BY PARAGRAPH (5) OF SECTION 20a OF THE INTERSTATE COMMERCE ACT, INCLUDING OBLIGATIONS OF THE CARRIER AUTHENTICATED OR ISSUED BY TRUSTEES OR OTHERS

Cleveland, Ohio, December 18, 1947

The undersigned hereby certifies that within the 10 days next preceding the above date THE CHESAPEAKE AND OHIO RAILWAY COMPANY has disposed of the securities set forth and described below:

1. Description of securities:	3½% Convertible Preferred Stock of the par value of $100 per share and Common Stock of the par value of $25 per share of The Chesapeake and Ohio Railway Company.
2. Date of application for authority with respect to the securities:	March 5, 1946.
3. Interstate Commerce Commission's finance docket number assigned to application for authority:	Finance Docket No. 15228.
4. Date of the Commission's order authorizing the disposition of the securities:	April 1, 1947.
5. Date of prior certificate of notification (if any) in which the securities are set forth and described:	December 6, 1947.

6. Disposition of the securities:	
(a) Authenticated by registrar:	
(1) Date of authentication:	December 8 and 12, 1947.
(2) Date of delivery to carrier:	Not delivered to carrier; delivered to stockholders of Pere Marquette Railway Company, or to their representatives, by J. P. Morgan & Co. Incorporated, Exchange Agent.
(3) Par value or principal amount:	$20,615.00.
(b) Sold:	Not sold.
(c) Pledged or repledged:	None.
(d) Otherwise disposed of:	
(1) Date disposed of:	December 8 and 12, 1947.
(2) Par value or principal amount:	$20,615.00.
(3) To whom disposition was made:	
(4) Manner and purpose of disposition:	
(5) Conditions and terms of disposition:	

To stockholders of Pere Marquette Railway Company in exchange for stock of that company at the rate of one share of Preferred Stock and 1/3 of one share of Common Stock for each share of Pere Marquette 5% Cumulative Prior Preference Stock; 8/10 of one share of Preferred Stock and 4/10 of one share of Common Stock for each share of Pere Marquette 5% Cumulative Preferred Stock; and 1/2 of o... share of Common Stock for each share of Pere Marquette Common Stock. During the period December 8, 1947, to December 17, 1947, inclusive, no shares of Prior Preference Stock, 181 shares of Preferred Stock, and 346 shares of Common Stock of Pere Marquette Railway Company, were exchanged by stockholders for 144 full shares and

scrip certificates aggregating .80 shares of 3½% Convertible Preferred Stock, and 244 full shares and scrip certificates aggregating 1.40 full shares of Common Stock. From June 9, 1947, to December 17, 1947, both inclusive, 201,082 full shares and scrip certificates aggregating 56 shares of 3½% Convertible Preferred Stock, and 296,521 full shares and scrip certificates aggregating 549.6667 full shares of Common Stock, have been issued in exchange for 110,042 shares of Prior Preference Stock, 113,870 shares of Preferred Stock, and 429,684 shares of Common Stock of Pere Marquette Railway Company, leaving outstanding in the hands of the public 1,958 shares of Prior Preference Stock, 10,419 shares of Preferred Stock, and 20,765 shares of Common Stock of Pere Marquette Railway Company.

IN WITNESS WHEREOF The Chesapeake and Ohio Railway Company has caused its name to be hereunto subscribed by its Secretary and Treasurer and its corporate seal to be hereunto affixed this 18th day of December, 1947.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

By (Signed) H. F. LOHMEYER

(CORPORATE SEAL) *Secretary and Treasurer.*

VERIFICATION

STATE OF OHIO
COUNTY OF CUYAHOGA } ss.

H. F. LOHMEYER, being duly sworn, says that he is the Secretary and the Treasurer of The Chesapeake and Ohio Railway Company, and he deposes and says that the matters and facts set forth in the foregoing certificate are true to the best of his knowledge, information and belief.

Sworn to before me this 18th day of December, 1947. (Signed) H. F. LOHMEYER

(Signed) ALLAN G. LEJA
Notary Public. Allen G. Leja
My commission expires June 10, 1948 (NOTARIAL SEAL)